IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, v. DAMEON MCDOWELL, Defendant.	Case No: 19-CR-00055-ABJ

ORDER DENYING MCDOWELL'S MOTION TO SUPPRESS AND VACATING SUPPRESSION HEARING

THIS MATTER comes before the Court on Defendant Dameon McDowell's *Motion to Suppress*, ECF No. 28, and the United States' response brief, ECF No. 32. As exhibits to their filings, the parties have submitted a dash camera video recording of the incident for the Court's review. ECF Nos. 28-1; 32-1 (hereafter "Video Recording"). The facts are predominately derived therefrom.[1]

I. BACKGROUND

On January 18, 2019, Officer Andrea Husted pulled over Mr. McDowell's Kia Sportage. Mr. McDowell had made a left turn onto a four lane road, with two lanes of traffic traveling in one direction and two lanes of traffic traveling in the other direction. ECF No. 28 at 1; Video Recording at 00:32–00:40. Once his turn was completed and

[1] Because the United States' video is unabridged, the Court's citations will refer to that video.

shortly after driving through a crosswalk, the video shows Mr. McDowell's Sportage straddling the white-dashed line separating the two lanes for traffic traveling in the same direction as Mr. McDowell. Video Recording at 00:40–00:50. The driving conditions were ideal: there was no snow, there was no rain, nothing indicated that it was a particularly windy,[2] it was daytime, the road was straight and relatively flat, there was little traffic, no impeding objects appeared in the road, and no pedestrians were in the immediate vicinity. *See generally id.*

Nevertheless, as stated, the Sportage failed to remain within one lane. *Id.* at 00:40. Although the Sportage was mostly in the left lane, its tires still crossed into the right lane and did so for approximately six seconds before Mr. McDowell turned on his passenger-side blinker and pulled into the right lane. *Id.* at 00:40–00:46. Presumably, Mr. McDowell did so when Officer Husted flashed her lights. Although Mr. McDowell did not immediately pull over, eventually he stopped outside an apartment complex. *Id.* at 01:25.

The dashboard video also shows that another car travelling behind Mr. McDowell crossed the center line as it turned left into the right lane. *Id.* at 00:40–00:43. That car still had its left blinker on for some of the time that it was between lanes. *Id.* at 00:40–00:41. As it completed its turn, the second car moved completely into the right lane. *Id.* at 00:43–00:44. That said, the car did straddle one or two dashed lines before doing so. *Id.* at 00:40–00:43. Officer Husted did not pull over that vehicle and instead pursued Mr. McDowell. *Id.* at 00:44–00:48.

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[2] An American flag can be seen flapping in the wind for about six seconds. Video Recording 01:04–01:10. However, rather than violently whipping in one direction, the flag gently vacillates.

Immediately after pulling over Mr. McDowell, a female passenger exited the Sportage and left the scene despite Officer Husted's order to stay with the vehicle. *Id.* at 01:32–01:43. Officer Husted decided to remain with the Sportage. *Id.* at 01:46. Once she determined that Mr. McDowell did not possess a valid driver's license, Officer Husted asked Mr. McDowell to exit the vehicle. *Id.* at 06:18–06:30, 09:14. She noticed that he had an empty holster on his hip and admonished him after he appeared to reach for it. *Id.* at 09:19–09:22. As Officer Husted attempted to place handcuffs on Mr. McDowell, he jumped away and ran from the scene. *Id.* at 09:25–09:26.

According to briefs, at that time Officer Husted searched the Sportage. ECF No. 28 at 2; ECF No. 32 at 2. She found a Taurus pistol with a thirty-round extended magazine under the driver's seat. ECF No. 28 at 2; ECF No. 32 at 2. Later, after Mr. McDowell's wife gave officers consent to search the McDowell's apartment and the officers obtained a search warrant, they found a Walther pistol and Keltec shotgun. ECF No. 32 at 2–3. Mr. McDowell's criminal record includes two prior violent felony convictions. *Id.* at 3. Consequently, the grand jury charged Mr. McDowell with being a felon in possession of a firearm under 18 U.S.C. §§ 922(g)(1), 924(a)(2). ECF No. 16.[3]

[3] Mr. McDowell filed a *Motion to Continue* (ECF No. 34), which this Court granted (ECF No. 35) because of the need to obtain records regarding juvenile adjudication of a second-degree murder charge. Depending on those records, there is the possibility that Mr. McDowell will face a fifteen-year mandatory minimum as an armed career criminal under 18 U.S.C. § 924(e).

II. THE FOURTH AMENDMENT AND TRAFFIC STOPS

The question here is whether, despite Officer Husted's unwillingness to pull over another car for similar conduct, the Fourth Amendment permitted Officer Husted to pull over Mr. McDowell's Sportage when he crossed the center line.

No matter how brief the stop may be, an officer implements a seizure when she stops a vehicle. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–58 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). The United States Constitution requires that such a seizure be reasonable. U.S. CONST. amend. I.V. Because "[a] routine traffic stop" is akin to an investigative detention, however, the Tenth Circuit evaluates the Fourth Amendment's reasonableness requirement in this setting according to "the principles . . . set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)." *United States v. Hunnicutt*, 135 F.3d 1345, 1348 (10th Cir. 1998) (citing *United States v. Botero-Ospina*, 71 F.3d 783, 786 (10th Cir. 1995) (en banc)).

A *Terry* analysis is two-pronged: first, was "the officer's action . . . justified at its inception"?; second, was the officer's action "reasonably related in scope to the circumstances which justified the interference in the first place"? *Id.* (citing *Terry*, 392 U.S. at 20). Only focusing on the first prong, Mr. McDowell argues that "[t]he stop here was not justified at its inception." ECF No. 28 at 3. Since another car crossed the center line Mr. McDowell claims that, under Wyoming traffic law and the Fourth Amendment, his traffic stop was unjustified. First, the Court will consider whether Officer Husted was

justified to pull over Mr. McDowell based on his conduct. If so, the Court will then consider whether the other driver's similar conduct affected that justification.

A) WYO. STAT. ANN. § 31-5-209(a)(i) and the Fourth Amendment

Like the stewards at the recent Kentucky Derby, the Wyoming legislature expects Wyoming drivers to drive in their lane:

> (a) Whenever any roadway has been divided into two (2) or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:
>
> (i) A vehicle shall be driven **as nearly as practicable** entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety . . . .

WYO. STAT. ANN. § 31-5-209(a)(i) (emphasis added). Wyoming case law explains the meaning of the language "as nearly as practicable." In *Dods v. State*, the Wyoming Supreme Court clarified that "[t]he use of the phrase 'as nearly as practicable' in the statute precludes . . . absolute standards and requires a fact-specific inquiry to assess whether an officer has probable cause to believe that a violation has occurred." 2010 WY 133, ¶ 18, 240 P.3d 1208, 1212 (Wyo. 2010). The statute does not create a bright-line rule and might not be triggered each time a driver deviates from her lane if the circumstances provide a reason for the deviation. *See id.*, ¶ 17–18, 240 P.3d at 1212.

Although the Wyoming Supreme Court indicated that the relevant inquiry requires an officer to have had probable cause, it appears that the Tenth Circuit only insists that an officer have "a reasonable articulable suspicion that a traffic or equipment violation has occurred" for Fourth Amendment purposes. *Hunnicutt*, 135 F.3d at 1348 (citing *Botero–Ospina*, 71 F.3d at 787). As discussed, this is because a traffic stop is more like "an

investigative detention than a custodial arrest." *Id.* (citing *United States v. Jones*, 44 F.3d 860, 871 (10th Cir. 1995)). And under *Terry*, a police officer must have a reasonable articulable suspicion to initiate an investigative detention. 392 U.S. at 27; *United States v. Melendez-Garcia*, 28 F.3d 1046, 1051 (10th Cir. 1994); *United States v. Soto*, 988 F.2d 1548, 1554 (10th Cir. 1993) (citation omitted) ("A traffic stop is an investigative detention analogous to a *Terry* stop, in that, although probable cause is not required, the detaining officer must have an objectively reasonable articulable suspicion that a traffic violation has occurred or is occurring before stopping the automobile."). A "reasonable suspicion may rely on information less reliable than that required to show probable cause and it need not be correct." *United States v. Vercher*, 358 F.3d 1257, 1261 (10th Cir. 2004) (internal citation omitted) (citing *Alabama v. White*, 496 U.S. 325, 330 (1990); *United States v. Callarman*, 273 F.3d 1284, 1287 (10th Cir. 2001)). To have a reasonable suspicion, an officer need only show "some minimal level of objective justification." *Id.* (internal quotation marks omitted) (quoting *I.N.S. v. Delgado*, 466 U.S. 210, 217 (1984)).

Tenth Circuit case law provides guidance for whether police officers have the "minimal level of objective justification" for reasonable suspicion in the context of a traffic stop. In *United States v. Alvarado*, a Utah Patrol Trooper pulled over Alvarado's Jeep Cherokee for crossing the highway's right fog line "for a few seconds" by "about a foot . . . ." 430 F.3d 1305, 1306 (10th Cir. 2005). There were no "weather conditions, road features, or other circumstances" that could have caused Alvarado to deviate from his lane. *Id.* at 1306–07, 1309. Hence, the trooper thought it possible that Alvarado was tired or under the influence of an impairing substance. *Id.* at 1307. After the trooper pulled

Alvarado over and gave him a written warning, Alvarado allowed the trooper to search his Jeep Cherokee. *Id.* The trooper discovered cocaine. *Id.*

Similar to Wyoming, Utah's statute required Alvarado to remain in his lane "as nearly as practical . . . ." *Id.* (citing UTAH CODE ANN. § 41-6-61(1)). Alvarado argued that because his deviation was so brief and slight, he remained in his lane "as nearly as practical." *Id.* at 1309. The Tenth Circuit disagreed: "we have already rejected the argument that the 'as nearly as practical' qualification in § 41-6-61(1) requires the conclusion, as a matter of law, that a single instance of crossing over the fog line can never violate the statute." *Id.* Instead, the Tenth Circuit held that a driver who deviates from his or her lane during ideal conditions can present police officers with reasonable suspicion that the driver was not staying in his or her lane "as nearly as practical." *Id.* at 1309; *see also United States v. Salas*, 756 F.3d 1196, 1201 (10th Cir. 2014) (citing *United States v. Harmon*, 742 F.3d 451, 458 (10th Cir. 2014); *Alvarado*, 430 F.3d at 1308; *United States v. Cline*, 349 F.3d 1276, 1287 (10th Cir. 2003); *United States v. Zabalza*, 346 F.3d 1255, 1258 (10th Cir. 2003); *United States v. Ozbirn*, 189 F.3d 1194, 1198 (10th Cir. 1999)).

Alvarado is the counterpart to *United States v. Gregory*, 79 F.3d 973 (10th Cir. 1996). In *Gregory*, Officer Barney pulled over a U-haul truck that crossed into the interstate's emergency lane by two feet. *Id.* at 975–76. The weather conditions were windy, the location was mountainous, "and [t]he roadway was winding." *Id.* at 975. Despite these turbulent driving conditions, Officer Barney pulled over Gregory because of the lane deviation and to see if he was awake. *Id.* at 976.

One of the questions before the Tenth Circuit was whether Officer Barney had reasonable suspicion to believe that Gregory was not staying within his lane "as nearly as practical." *See id.* at 978. Under the less-than-ideal driving conditions, the Tenth Circuit found that "any vehicle could be subject to an isolated incident of moving into the right shoulder of the roadway, without giving rise to a suspicion of criminal activity." *Id.* In other words, when the driving conditions are suboptimal, drivers can still stay within their lane "as nearly as practicable" if they digress from it because of those conditions—that is, because of "all the surrounding facts and circumstances . . . ." *See United States v. Valenzuela*, 494 F.3d 886, 889 (10th Cir. 2007) (citing *Ozbirn*, 189 F.3d at 1198).

The Court agrees with the United States that "McDowell's situation is like that present in *Alvarado* and unlike the one present in *Gregory*." ECF No. 32 at 5. The weather conditions were ideal and the roadway was straight. And unlike in *Gregory*, Mr. McDowell was not driving a tall U-haul truck that would be susceptible to gusts of wind. Hence, the Court concludes that no objective condition contributed to Mr. McDowell's inability to remain within his lane. The Court therefore also concludes that, under *Alvarado*, *Gregory*, and other Tenth Circuit precedent, Officer Husted had reasonable suspicion to stop Mr. McDowell's Sportage.

B) Did Another Driver's Lane Violation Affect Officer Husted's Reasonable Suspicion to Detain Mr. McDowell?

Mr. McDowell argues that Officer Husted had no reasonable suspicion to pull him over because another vehicle also crossed the center line. Saving a single citation to *Zabalza* that the Court will differentiate later, Mr. McDowell cites no authority for his

proposition. Nor could the Court find any such authority. That is likely because Mr. McDowell's assertion is not born from principles underlying the reasonable suspicion analysis.

Reasonable suspicion analysis requires courts to "judge the officer's conduct in light of common sense and ordinary human experience but also to grant deference to a trained law enforcement officer's ability to distinguish between innocent and suspicious circumstances." *United States v. Lopez*, 518 F.3d 790, 797 (10th Cir. 2008) (quoting *United States v. Ramirez*, 479 F.3d 1229, 1244 (10th Cir. 2007)). Courts should "look at the totality of the circumstances to determine whether a particularized and objective basis, viewed from the standpoint of an objectively reasonable police officer, existed for suspecting legal wrongdoing." *Id.* (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). As the United States Supreme Court explained, a totality of the circumstances analysis does not accommodate a "divide-and-conquer" approach. *Arvizu*, 534 U.S. at 274. Courts should not consider each factor and observation in isolation at the cost of perceiving the bigger picture. *United States v. Guerrero*, 472 F.3d 784, 787 (10th Cir. 2007). In this context, the sum of the whole is greater than its parts.

Though observations and factors cannot be isolated for the overall reasonable suspicion analysis, multiple suspects must still be considered separately. The Tenth Circuit has stated that "[a]n officer may not 'legally detain a person simply because criminal activity is afoot. The **particular person** [who is detained] must be suspected of criminal activity.'" *United States v. De La Cruz*, 703 F.3d 1193, 1199 (10th Cir. 2013) (second alteration in the original) (emphasis added) (quoting *Romero v. Story*, 672 F.3d 880, 887–

88 (10th Cir. 2012)). In *De La Cruz*, the Tenth Circuit refused to ascribe a suspicion of unlawful activity to people who provided transportation to individuals illegally in the United States by virtue of mere association. *See id.* (citing *United States v. Brignoni–Ponce*, 422 U.S. 873, 885–87 (1975)). By the same token, the Tenth Circuit has "decline[d] to base the reasonableness of the defendant's detention on the actions or status of the other men in his group . . . ." *United States v. Soto-Cervantes*, 138 F.3d 1319, 1324 (10th Cir. 1998) (citing *Whren v. United States*, 517 U.S. 806, 812–14 (1996)).

The reasonableness of Mr. McDowell's detention is not based on other drivers. It is based on all of Officer Husted's observations and her ability to "distinguish between innocent and suspicious circumstances." *Lopez*, 518 F.3d at 797 (quoting *Ramirez*, 479 F.3d 1229, 1244). The "sole inquiry is whether this particular officer had reasonable suspicion that **this particular motorist** violated 'any one of the multitude of applicable traffic and equipment regulations' of the jurisdiction." *Botero-Ospina*, 71 F.3d at 787 (quoting *Prouse*, 440 U.S. at 661) (emphasis added).

In this case, Officer Husted saw this particular motorist straddle the center line on a clear day without any evidence of poor road conditions. She therefore had reasonable suspicion that Mr. McDowell was not staying in his lane "as nearly as practicable" under WYO. STAT. ANN. § 31-5-209(a)(i). That another driver might not have been staying in his or her lane "as nearly as practicable" either does not mean that Mr. McDowell was staying in his lane "as nearly as practicable." On the contrary, since the driving conditions were ideal, both drivers should have remained in their lanes. But since two wrongs do not make

a right, Mr. McDowell cannot complain that Officer Husted chose to detain him instead of someone else.

Finally, the Court does not accept Mr. McDowell's argument premised on *Zabalza*. The driving conditions were also unproblematic there: "the weather on this particular day was overcast with some wind, but, in [Sergeant Kummer's] judgment, the weather would not have made it impracticable for a driver to maintain a single lane of travel. Sergeant Kummer had no difficulty maintaining a single lane and had not seen other drivers having difficulty." 346 F.3d at 1257. Zabalza, though, did experience difficulty maintaining a single lane—he crossed the center line twice. *Id.* at 1258. As a result, Sergeant Kummer pulled over Zabalza. *Id.* After doing so, the sergeant smelled marijuana coming from the car and decided to search the trunk. *Id.* Sergeant Kummer found numerous brown packages containing marijuana. *Id.*

Again similar to Wyoming's statute, the applicable statute required Zabalza to maintain his lane "as nearly as practicable . . . ." *Id.* at 1258 (quoting KAN. STAT. ANN. § 8-1522 (a)). Because the weather conditions did not present any difficulty for drivers to maintain a single lane yet Sergeant Kummer observed Zabalza fail to maintain a single lane, the Tenth Circuit concluded that the traffic stop was reasonable. *See id.*

Under *Zabalza*, Mr. McDowell argues that Officer Husted had no reasonable suspicion to pull him over when another car also crossed the center line. But that stretches *Zabalza* too far. In looking at the factual background, the Tenth Circuit only indicated that since other vehicles had not been forced out of their lanes it appeared that the weather conditions were not severe. *See id.* at 1257–58. The other drivers were only mentioned in

connection with the weather. *Id.* at 1257. Hence, *Zabalza* does not suggest that other drivers and their lane deviations are relevant in the absence of a linkage with the driving conditions. At most, *Zabalza* indicates that poor weather or road conditions can be evidenced by other lane deviations.

But here, Mr. McDowell has not argued that the driving conditions were the cause of his lane deviation. Instead, the totality of the circumstances indicate that the driving conditions were ideal, meaning that both drivers should have remained in their lanes. Perhaps if there had been a violent windstorm that blew both vehicles out of their lanes, the other car's deviation would have been evidence that Mr. McDowell was staying in his lane "as nearly as practicable." But that is not this case. Simply because the other driver failed to maintain a single lane under the ideal conditions did not make it impracticable for Mr. McDowell to stay within his lane. Because there is no other evidence suggesting that Mr. McDowell could not have stayed within his lane, the Court concludes that Officer Husted had reasonable suspicion and sufficient justification to initiate the traffic stop.

III. CONCLUSION

Sometimes it is impossible for drivers to stay within one lane because of weather and road conditions. That is why the Wyoming legislature only requires drivers to drive within their lanes "as nearly as practicable." However, when driving conditions are ideal, Tenth Circuit precedent establishes that a single lane violation can provide officers with reasonable suspicion that a traffic law has been broken and that a traffic stop is warranted. In this case, Mr. McDowell crossed the center line for multiple seconds. No driving conditions excused his subnormal driving or indicated that he was maintaining his lane "as nearly as practicable." Accordingly, the Court finds that his traffic stop was justified and that the fruits of that seizure should not be suppressed. It is therefore

ORDERED that Mr. McDowell's *Motion to Suppress*, ECF No. 28, is hereby **DENIED**;

IT IS FURTHER ORDERED that the suppression hearing set for June 17, 2019, is hereby **VACATED**.

Dated this 29th day of May, 2019.

Alan B. Johnson
United States District Judge